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No. 85-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AD HOC COMMITTEE FOR AKWESASNE RIGHTS,
Petitioner,

v.

REYNOLDS METALS COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM IN OPPOSITION OF THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS AND ASSENTING CLASS REPRESENTATIVES

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Petitioner seeks certiorari on two grounds: 1) that the Court of Appeals erred in holding that it had not appealed from the award of attorneys' fees, and 2) that the settlement should not have been approved.

1. On the settlement, we rely principally on the opinions of the district court and the court of appeals. We add the following. After extensive discovery and preparation for trial it became clear that plaintiffs' case was not nearly as strong as we had originally believed. A major

independent health study, upon which plaintiffs were relying to prove human health injury, showed no current injury and predicted no future injury. The cattle and vegetation damage had become dramatically less than before an earlier round of pollution control. Against this background the $666,900.00 (Canadian) settlement for non-health injury only [1] was clearly reasonable.

The settlement was widely explained and discussed and was signed by all the leading farmers of the community. It was reviewed by two outside attorneys, Mr. Bruce Terris, of Washington, D.C., with eminent credentials in environmental law, and Mr. Richard Lippes of Buffalo, New York, selected by petitioner. *Both* recommended the settlement. In short, there is no doubt that the settlement is fair and no reason for this court to review the unanimous decisions of the district court and court of appeals approving it.

2. Petitioner also seeks this Court's review of the court of appeals' ruling that it had not appealed the award of attorneys' fees. Petitioner presents this as inartful pleading on its part and overtechnicality on the part of the court of appeals, but this is not the case.

The fact is that petitioner did not challenge the amount of the attorneys' fee below. This is not surprising. The attorneys originally took this case on an hourly fee basis under a contract with the Band approved by the leading farmers. When it became clear that the Band did not have the funds to pay the attorneys and expert witnesses on an hourly basis, the attorneys agreed to be paid out of the recovery, on a percentage basis but not less than their hourly billings on the case at their ordinary hourly rates.

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[1] Health claims had been dismissed without prejudice prior to the settlement. The settlement expressly excluded those claims. Thus they may be brought again when and if the evidence merits.

To facilitate the settlement the fees requested (and approved by the district court) were some 25 percent less than the hourly billing. All of this was thoroughly documented in the fee petition. See also Pet. App. at 33-34.

Indeed, the attorney for the petitioner, when asked to give *all* his objections to the settlement, said:

> As far as the fees, [the objectors] will testify * * * that they are very grateful to Mr. Sachse for the work he's done, and his tireless effort over the years on this case.
>
> Their objection is that the fee will be paid out of the settlement * * *. [T]he cause of the pollution is Reynolds and Alcoa. They should pay that beyond whatever the offer of settlement is * * *.
>
> * * * So that the Ad Hoc Committee * * * would object to the payment *from the source that it's indicated to be from.*

Supp. App. on appeal Vol. II, pp. 23-24 (emphasis added). This was the *only* objection made to the fees before the district court. Indeed none of the witnesses objecting to the settlement testified against any aspect of the attorneys' fee petition.

The district court issued separate orders approving the settlement and approving the attorneys' fees. Supp. App. Vol. II, 432-433; Supp. App. Vol. II, 434-435. The notice of appeal referred only to the settlement order. Notice of Appeal, Docket No. 348. In light of the lack of testimony opposing attorneys' fees and the statement of petitioner's counsel, the omission of attorneys' fees from the notice of appeal does not appear to have been inadvertent.

The situation here is thus not like *Foman v. Davis*, 371 U.S. 178 (1962) relied upon by plaintiff. Under the circumstances here the court of appeals could reasonably conclude that petitioner had not appealed what he had not contested below. Indeed, had the court of appeals not

so found, it certainly would have held against petitioner on the ground that it had not raised the issue below or would have affirmed on the merits. There is no reason for this Court's review under these circumstances.

The settlement provides significant benefits to the St. Regis people. Distribution of the funds has been long delayed by the unfounded objections of the Ad Hoc Committee. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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